In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 166

THOMAS KAPATOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty of theft of jewelry in an interstate shipment, in violation of 18 U.S.C. 659 (R. I, 2; R. II, 64a).[1] On October 28, 1966, petitioner was sentenced to imprisonment for 7½ years (R. II, 64a). On March 15, 1967, the court of appeals affirmed the conviction without opinion (R. II, 80a). On April 10, 1967, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including May 13, 1967. The petition for a writ of certiorari was filed on May 17, 1967; it is therefore

[1] The court dismissed count 2, a conspiracy count, at the close of the government's case (R. I, 300).

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out of time under Rules 22(2) and 34(2) of the Rules of this Court. In any event, petitioner raises no issue warranting review by this Court.

1. The government's evidence showed that on November 8, 1963, six messengers of the AAA Jewelry Messenger Service were transporting a load of jewelry in a station wagon to the firm's Nassau Street office in Manhattan (R. II, 2a–5a). As the station wagon was proceeding on West 41st Street near 11th Avenue, it was overtaken on its driver's side by a black sedan. The driver of the sedan and its passenger were dressed in police uniforms (R. II, 6a–8a, 21a–22a). The passenger, with his gun drawn, said, "Get out, this is a holdup," and the six messengers left the station wagon from the left side (R. II, 7a, 8a, 11a, 23a, 28a–29a). At the trial, four messengers identified petitioner as the passenger (R. II, 10a, 15a, 18a–19a, 24a–25a, 29a–30a).[2] As petitioner was ushering the messengers out of the station wagon, a panel truck pulled up with three other men in work clothes, two of whom wore masks and had guns (R. II, 8a–9a, 23a). After the six messengers had been forced into the truck and handcuffed, the driver, with the two masked men accompanying him, drove the truck a few blocks before abandoning it (R. II, 8a–9a, 23a–24a, 29a).

One of the "policemen" had trouble starting the AAA station wagon with a stick shift and asked one Mullett, an ironworker nearby, to help him, but Mul-

[2] Two messengers were unable to identify petitioner as the "policeman" who stopped the station wagon (R. I, 204, 225).

lett said he did not want to get involved. The "policeman" then alighted from the station wagon, walked west toward West Street, and disappeared (R. I, 289–292). Mullett said that this policeman was about 5 feet 10 inches tall, weighed between 180 and 200 pounds, and had short-cropped red hair (R. I, 292). Mullett testified that petitioner was not the policeman he had seen in the station wagon (R. I, 293). There was defense testimony by two ironworkers and a frankfurter vendor that the policeman who had trouble starting the station wagon had red hair and was not the petitioner (R. I, 318, 321, 330).

During 1965, two years after the robbery, three messengers identified petitioner as the robber upon seeing him on the street. One, Kreisman, testified that in November 1965, while in the presence of two F.B.I. agents, he had seen petitioner on Delancey Street underneath the Williamsburgh Bridge and had identified him as one of the participants in the robbery (R. II, 10a–11a). Another, Figueroa, testified that the same month, in the company of Moots (another messenger) and two F.B.I. agents, he had identified petitioner as "very much alike to that man who stop us" (R. II, 19a). The third messenger, White, testified that in December 1965 in the presence of agents he had identified petitioner when he saw him in front of the Homestead Restaurant (R. II, 25a).[4]

In the prosecutor's closing argument he stated:

> Now there were two cops there and it's perfectly obvious that one had red hair and it was

[4] The indictment was returned on January 14, 1966, and petitioner was arrested on January 17, 1966.

> short-cropped and that he had some kind of a blue dye running down his face. And that's the man that Mullett saw, that's the man that Rossi saw, that's the man that Carey saw, and that's the man that the frankfurter vendor saw (R. I, 421).
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> * * * * *
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> This is not a question of, is it the cop or the red-headed man? It was the cop and the red-headed man. And they stuck up that station wagon together with two other men who were wearing masks and one rather toothy individual who drove the van away in accordance with Kreisman's testimony (R. I, 424).

Petitioner's contention that the prosecutor was improperly permitted to make this argument, since he was in effect testifying to facts not in the record, is without merit. It is based upon the erroneous premise that there was no evidence of participation in the robbery by the second "policeman," who drove the sedan from which petitioner alighted when he stopped the station wagon. There was, however, explicit testimony by Kreisman that the driver of the black sedan was "also wearing a policeman's uniform" (R. II, 8a). Thus, the prosecutor was justified in stating in his closing argument that there were two policemen—the petitioner and the red-headed driver of the black sedan who had been seen by defense witnesses when he attempted to start the stalled station wagon. This was necessary to refute defense counsel's contention that there was only one policeman involved, the redhead who was admittedly not the petitioner.

2. The facts belie petitioner's contention that the evidence was insufficient to identify him as one of the participants in the robbery. Four messengers at the trial identified petitioner as the "policeman" who stopped the station wagon at the scene of the robbery. Three messengers testified that they had identified petitioner as a robbery participant when they saw him in public places two years subsequent to the robbery. The testimony on the issue of identity was fully and fairly presented to the jury, whose province it was to decide the issue. See *United States* v. *Dickerson*, 347 F. 2d 783, 784 (C.A. 2).

3. There is no merit to the contention that the pretrial out-of-court identification of petitioner deprived him of due process by denying him a fair and impartial line-up, or that Kreisman's identification initiated the accusatory stage of the proceeding so that the observations by the other messengers should not have been permitted without first affording petitioner a right to counsel. This argument overlooks circumstances that the district court rightly regarded as highly significant—at the time of the identifications the "* * * defendant was not then in custody; the crime was unsolved; no arrests had been made; the matter was still under investigation" (Pet. App. 4a). In substance, petitioner is contending that the agents had an obligation either to arrest him so as to place him within the rule in *Escobedo* v. *Illinois*, 378 U.S. 478, or to advise him to obtain an attorney since a witness was about to observe him for identification purposes. However, "[t]here is no constitutional right to be arrested," *Hoffa* v. *United States*, 385 U.S. 293, 310, and peti-

tioner, mingling with others in public places, had no privilege against being observed by potential witnesses. See *Schmerber* v. *California*, 384 U.S. 757; *Holt* v. *United States*, 218 U.S. 245.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.
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* The principles recently enunciated by this Court in *United States* v. *Wade*, No. 334, O.T. 1966, are applicable only to confrontations for purposes of identification conducted after June 12, 1967. *Stovall* v. *Denno*, No. 254, O.T. 1966. Moreover, the viewing here, since it occurred prior to petitioner's arrest, would appear not to be within those principles.

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